Waste Management, Inc. *and* Teamsters Local No. 463, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 4–RC–19571

February 14, 2000

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held December 18, 1998, and the hearing officer's report recommending disposition of them (pertinent portions are attached as an appendix). The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 70 for and 108 against the Petitioner with 10 challenged ballots, a number insufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations, and finds that the election must be set aside and a new election held.[2]

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting.

Contrary to my colleagues and the hearing officer, I would overrule all of the Petitioner's objections and certify the results of the election.

My colleagues conclude that the Employer's refusal to permit employees to use the Employer's bulletin board for union materials was objectionable. In the circumstances of this case, I cannot agree.[1]

Significantly, in my view, the hearing officer found that the Employer did not change its bulletin board policy in response to the union campaign. Thus, the policy was not motivated by that campaign. Further, the policy, on its face, does not refer to union-related materials. Rather, the policy and the practice is to ban all controversial material (e.g., sexual material), not just union-related material. Finally, since the Employer regards union-related materials as controversial, the Employer bans both prounion and antiunion materials.

In short, this case does not involve a policy motivated by union activity. Nor does it involve discrimination against union-related material or against prounion material. In these circumstances, I would not condemn the policy as objectionable.[2]

My colleagues also find objectionable the conduct of Supervisor Ronald McClain, who told employee Paul Trueman that he would be discharged for defacing a piece of procompany campaign literature. I assume arguendo that this threat would be objectionable if it were disseminated to a determinative number of voters. The tally of ballots here shows 70 for the Petitioner, 108 against, with 10 challenged votes. Although there was some dissemination of the threat, it clearly was not disseminated to a sufficient number of voters to have affected the results of the election.[3] See, e.g., *Westek Fabricating*, 293 NLRB 879 (1989).

---

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objections 1, 3, 5, and 6 (except for that portion related to a threat of discharge), and 9.

[2] We agree, for the reasons stated by the hearing officer, that the Employer's bulletin board policy, both on its face and as applied, constituted objectionable conduct (Objections 2 and 10). We stress that the hearing officer's analysis is in accord with well-established Board precedent, cited by the hearing officer, and that our dissenting colleague's analysis would require that that precedent be overruled.

Further, we adopt the hearing officer's recommendation to sustain the Petitioner's Objection 6 regarding Supervisor Ronald McClain's threat to discharge employee Paul Trueman because he had defaced a piece of the Employer's antiunion campaign literature. We do not agree with our dissenting colleague that the threat was not sufficiently disseminated to have affected the election results. In fact, the hearing officer found that "several" other employees were present when the threat was made, and Trueman identified three of those employees. In addition, employee Frable immediately learned of the threat either from Trueman or from one of the employees who witnessed the threat. One of those employees, David Rice, and Frable immediately went inside to the dispatch room and when Trueman arrived there, Rice, Frable, and several other employees were all arguing about the antiunion cards distributed by the Employer, which were the subject of the threat of discharge made to Trueman. In these circumstances, although we do not know the exact number of employees involved, we have no trouble inferring that the threat was immediately a subject of conversation among many employees. As the hearing officer correctly observed, a threat of discharge of this sort is highly coercive and one of the most serious forms of employer misconduct. See *Lakehaven Nursing Home*, 325 NLRB 250, 251 (1997). Accordingly, we adopt the hearing officer's conclusion that this threat was objectionable conduct warranting a second election.

[1] The Employer's policy was as follows:

> SECTION XIV—BULLETIN BOARDS
>
> A. The bulleting boards are available for the posting on non-controversial items by employees. Any item desired to be posted must be submitted to the Human Resources Department for approval.

[2] See, e.g., *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996) (discrimination not found, even though employer prohibited union solicitation, and permitted nonunion-related solicitations); *NLRB v. Riesbeck Food Markets*, 91 F.2d 132 (4th Cir. 1996) (unpublished decision) (discrimination not found, even though employer prohibited a union "do not patronize" solicitation, and permitted nonunion-related solicitations).

In view of the above, I find nothing objectionable in the Employer's informing employee Woolf that he was subject to discipline if he failed to remove a union notice from the bulletin board.

[3] According to my colleagues, the threat of discharge was heard by three identified employees and was disseminated to one other employee. Thus, the Union has established only that four employees were aware of the threat. Although several other employees discussed the Employer's antiunion cards, this is not the same as discussing the threat of discharge (the allegedly objectionable conduct). In these circumstances, and given the large differential in the vote, I do not believe that the Union has established a basis for overturning the election.

APPENDIX

REGIONAL DIRECTOR'S REPORT ON OBJECTIONS

. . . .

OBJECTIONS 2, 3 AND 10

The above objections can be appropriately amalgamated for discussion insofar as all relate to Petitioner's contention that the Employer, during the critical period, changed its policy on access to the employee bulletin board (Objection 3), promulgating in its place a policy that treated protected postings in an impermissible manner (Objection 10) and that, as a consequence, at least one employee was threatened with discipline (Objection 2).

Undergirding this discussion lies the Employer's policy on bulletin boards as set forth in the employee handbook which was, as the Employer acknowledges, in effect at all relevant times here, including the period leading up to the election. The policy is set forth below:

> SECTION XIV–BULLETIN BOARDS
>
> A. The bulletin boards. are available for the posting of noncontroversial items by employees. Any item desire to be posted must be submitted to the Human Resources Department for approval.

There was one bulletin board designated for employee use in the cafeteria and there is no dispute that employees had access to this board for posting personal notices,[10] a policy that continued after the filing of the petition. At some point it appears in late November, and after the November 16 petition filing, employee Franklin Woolf attempted to post some prounion literature on this bulletin board. For several days running, Woolf would post the literature on the bulletin board in the morning, and when he returned to the facility in the afternoon after completing his work in the field the materials would have been taken down. He assumed it was done by employees who were not sympathetic to the Union, and he actually saw on one occasion an employee take the materials down, though Woolf did not make an issue of it.

After several days of this ritual, Woolf decided to repost the documents in the afternoon when he returned after finishing his route. After doing so, he was told by the dispatcher, William Black, that this was not permitted.[11] Woolf informed Black he was not going to remove what he had posted and proceeded to take a seat in the cafeteria. Within a few minutes Joseph Murphy, company vice president and plant general manager, walked into the cafeteria accompanied by several members of supervision.

There is agreement that after entering the cafeteria Murphy instructed Woolf that he could not post his union literature on the employee bulletin board. While there is general accord as to what happened next, the two protagonists retold the story with marginally different emphases. Woolf acknowledged that he immediately took exception to this directive and questioned Murphy why he had been able to post other items on the bulletin board. Murphy, at that point, took the literature off the bulletin board, whereupon an obviously agitated Woolf told him to:

> Go, ahead, f—king rip it down. I'll turn around and put another one back up there. He said, we're going to write you up for insubordination. I said, you do what you want. I said, I am on my own time, doing my—the things the way I'm supposed to do it, by the book, and you're giving me a hard time about it."[12]

By Woolf's account, the episode ended with Murphy walking off. No discipline was ever received but he never again attempted to post his campaign matter on the board. In Murphy's version, after he told Woolf he could not place his material on the bulletin board, he received the response that Woolf would hang the material "some other f—king place"[13] and then, his inquiry whether Woolf was finished with work that day was met with a reply that Woolf was "waiting for his f—king ride."[14] This language prompted Murphy to caution Woolf that he was getting close to being considered insubordinate whereupon Woolf encouraged Murphy to "write me the f—k up and I'll sign it."[15] To defuse the situation, Murphy then walked off and no discipline issued. It does appear that several other employees were present during the exchange between Murphy and Woolf.[16]

It was Murphy's testimony that at all times, both before and after the campaign, he was guided by the language in the employee handbook and removed "controversial" materials from the employee bulletin board. Unrelated to the issue of the union campaign, he recalled that on occasions prior to the filing of the petition, he removed materials that he considered marred by inappropriate sexual references. During the campaign, he interpreted employer policy as meaning any document "pro" or "anti" union was controversial and would remove literature from either perspective. He gave the specific example of removing several "anti" pieces of literature that identified Woolf as a union leader and targeted him as object of derision. Murphy made clear that the policy was not extended elsewhere in the lunch area where campaign literature was frequently in evidence. The testimony is inconclusive, however, whether campaign literature was regularly distributed in the cafeteria, though certainly there is no evidence to suggest management extended its ban to this area, apart from the bulletin board, and it appears that at least some materials were left in this area. There is support as to Murphy's point that the employee bulletin board was off limits to both sides for campaign purposes.[17]

In terms of analysis, there is simply no way that the section XIV of the employee handbook both as written and as admittedly applied by Murphy can pass statutory muster. It has long been held that an employer violates the Act if it prohibits "the posting of material relating to and in the course of concerted activity of its employees, while having previously allowed the posting of other miscellaneous matters by the employees." *Vin-*

[10] Typical of such postings were notices concerning the sale of items such as pets, automobiles, and household products as well as announcements of picnics and candy sales.

[11] The parties could not agree as to Black's employee status but it is an issue that does not have to be resolved in light of what subsequently occurred in the cafeteria.

[12] Tr. 20.

[13] Tr. 238.

[14] Tr. 238.

[15] Tr. 239.

[16] Woolf identified three employees by name who were present, and believed there were others as well. Murphy just recalled that there were a "number" of employees present (Tr. 239).

[17] See Woolf's testimony, Tr. 40.

cent's Steak House, 216 NLRB 647 (1975). See also *Benteler Industries,* 323 NLRB 712 (1997); *Eaton Technologies, Inc*., 322 NLRB 848 (1997); and *Central Vermont Hospital*, 288 NLRB 514 (1988). The Employer's motivation in this regard, no matter how well meant, is irrelevant. *Honeywell, Inc*., 262 NLRB 1402 (1982). It is also irrelevant as to how the Employer treats antiunion literature, once it is established that other employee notices are treated disparately from prounion notices. *Ford Motor Co.*, 315 NLRB 609, 615 (1994); *Stanley Furniture Co.*, 244 NLRB 589 (1979).

While agreeing with the Petitioner as to the validity, or lack thereof, of the policy, I do take issue with its view that the bulletin board policy changed during the critical period. I would credit Murphy's very logical testimony that he consistently applied the rule to materials he deemed controversial, not being until November 1998 that he had to apply the guideline to union campaign material. All this means, however, that the Employer cannot be found to have engaged in objectionable conduct by *changing* its policy on bulletin board access. It does not alter the fact that the policy both facially[18] and as practiced constituted an improper infringement on the rights of employees to engage in Section 7 activity. This is the type of denial of employee access to an important medium of communication during a campaign that has been considered objectionable by the Board. *Ford Motor Co.*, supra, at 615; *Bon Marche*, 308 NLRB 184 (1992).[19] I would, therefore, find both the existence as well as the enforcement of the policy as justification for setting aside the election.

This finding is only strengthening by the threat of discipline directed at Woolf when he objected, albeit inelegantly, to Murphy's edict on bulletin board access.[20] The Employer's position is that Murphy only raised the possibility of insubordination in response to Woolf's use of profanity. The profanity, however, was inextricably bound up in Woolf's protest, and cannot be separated from the protected nature of this activity. The expletives used by Woolf did not remove his provoked outbursts from the Act's protection. *Health Care & Retirement Corp. of Americas,* 306 NLRB 63 (1992); *Coors Container Co.,* 238 NLRB 1312, 1320 (1978). For these reasons, the threat to find Woolf insubordinate was further conduct by the Employer that would warrant setting aside the election, especially where there the threat was made in the presence of additional employees. In view of the foregoing, while I recommend that Objection 3 be overruled, I recommend that Objections 2 and 10 be sustained.

[18] Even if the issue of enforcement had not been joined, the wording of the clause, while not specifically prohibiting the posting of protected literature limits the postings to "noncontroversial items" a phrase that is unnecessarily ambiguous and could restrain employees in the exercise of protected rights. *Ford Motor Co.*, supra at 610.

[19] In *Bon Marches,* the Board goes to some length to distinguish another case, *Heartland of Keyser*, 275 NLRB 168 (1985), that bears at least a passing resemblance to the instant set of facts in that the Employer practiced an even handed policy towards prounion and antiunion literature. The Board noted, however, that in *Heartland* the employer did not change its policy in response to the campaign and there were no other meritorious objections, two distinctions from *Bon Marche*. In this case, while the Employer may not have changed policy as a consequence of the campaign, it did engage in other objectionable conduct. Further, in *Heartland*, the "evenhanded" policy was initially to remove union and nonunion literature from the bulletin board, and then, 3 weeks before the election, the policy changed to allow both types of propaganda to *remain* on the bulletin board for 3 or 4 days. Obviously, this is different from the total ban placed on such literature here, with another critical difference being that the *Heartland* policy was found to be a valid rule by the Board, and no such blessing could be given to this Employer's sec. XIV.

[20] For purposes of this discussion, Murphy's version will be that credited though I would find that the distinctions between the two accounts are without substantive difference.

OBJECTION 6

Objection 6 is based on a complex chain of events raising allegations of surveillance, threats of discharge, and other forms of prohibited interference. It was all precipitated by the Employer's distribution of a piece of campaign literature a few weeks before the election. It appears that the Employer regularly distributed to its employees literature at work and, in the case of their drivers, would in the morning place the distributions on their clipboards along with route assignments. Regarding the literature at issue, it was postcard size and carried a rather commonplace Employer message that the real reason a union wanted employee support was to gain their dues money.

It is not the wording on the card that Petitioner excepts to. Rather, it was the fact that one of the supervisors, Ron McClain, placed the initials of all the employees in the recycling division on the cards he distributed.[21] These initials were written in pencil, in approximately the same size as the type face, just above a "Vote No" imprint that appeared on the bottom of the card. One of the Petitioner witnesses, Paul Trueman, testified that he did not happen to see his initials on the card when he went to the dispatch room to get his clipboard on the date in question. He did read the card and apparently was not persuaded as he wrote on it "F—k You" and "Teamsters, Vote Yes." Trueman then stated that he threw the card on the floor as he had seen others do.

Trueman then returned to his truck to prepare for the day's activities. Shortly thereafter, McClain approached and told him he was fired as he defaced a piece of campaign literature. McClain also said that he knew it was Trueman because the soiled card bore his initials. While Trueman believed McClain did not have the authority to terminate him, he testified that McClain went on to say that he was going to take it to Chuck Jewel, a higher management official, and that Jewel was going to fire him over it. Trueman told McClain that he could not discharge him and the conversation appeared to end. Trueman performed his route that day, and continued to work with the incident never being raised again by anyone from management. He identified three other employees who were present during his exchange with McClain, one of whom was David Rice.

Subsequently, that morning, it appeared that Rice went to another employee, Rhonda Frable, and told her about the cards being initialed. She also appeared to have learned of the threat to Trueman, though it is not clear whether he told her this, or if she heard it from Rice. Frable, like Trueman, had received the "vote no" card that morning but did not realize that it was marked with her initials. After talking to Rice she became concerned as she had left hers on a table in the dispatch room.

Frable's testimony was that she then went inside the cafeteria area, which adjoins the dispatch room. She saw a number of employees sitting at a table going through the cards, passing comments such as "this one is fired, that one is fired. This one is going to go. I can't wait to screw this one."[22] She then ap-

[21] It appears that approximately 2 dozen employees were under his supervision and may have received the initialed cards.

[22] Tr. 70.

proached the table and attempted to grab the cards but was stopped by Supervisor Terry LaRose who was also sitting there.[23] It appears that LaRose and Frable commenced a heated discussion with LaRose expressing concern over some recent newspaper articles that had appeared locally. Frable noted that LaRose was upset because employees had made the campaign public business and asked insistently "who wrote the article"[24] and threatened that "they were going to be fired also."[25] At some point Frable left, never having found her card.

The Employer did offer Terry LaRose as a rebuttal witness to at least as to some of the allegations raised by the objection. He acknowledged that he was in the cafeteria when Frable entered and that she was clearly upset. He remembered that she started screaming as to the whereabouts of her card and that she found it in the trash. She then, as he remembered, confronted him about the initials and how the Employer was unfair. LaRose countered by telling her he thought it was unfair for the Union to take their issues to the newspaper. He was referring to two articles that had appeared in the local press, one of which was entered by the Employer as an exhibit. He denied having asked who wrote the articles, and denied making any attendant threats of discharge. He stated that there would have been no reason to inquire as to the author as the employee source was mentioned in the body of the story. LaRose further went on to explain that he realized it was McClain who had placed the initials on the cards, as the initials were those only of employees under his supervision. He claimed that he later spoke to McClain about it and was given the explanation that it was done only to make sure that everyone got the information. As for McClain, he was not called to testify.

It is the Petitioner's argument that the Employer engaged in some form of surveillance and/or polling by distributing antiunion literature bearing employee initials. It cites *Circuit City Stores,* 324 NLRB 147 (1997), for the proposition that an employer may not issue antiunion paraphernalia or materials in a manner that pressures the employee to make or reject the employer's proffer thereby revealing their union sentiments. In that case the employer offered coffee mugs to employees imprinted with the words "Vote No" and "Just Vote No." Employees were placed in the situation where they would reasonably believe that a refusal to accept a mug would be construed as a rejection of the employer's campaign position.

The facts under review are distinguishable from the *Circuit City* line of cases. Here, the Employer distributed the "vote no" cards to all employees and did not ask for them to be returned or exhibited in some manner that would have established employee preferences. Perhaps McClain was ill advised to place employee initials on the material but to find a violation one would have to ascribe to McClain the almost divine foreknowledge that employees would throw these cards over the floor, leaving a telltale trail. I cannot reach such a conclusion, especially where the employees were under no compulsion to leave these cards behind.[26]

I also find that no objectionable conduct occurred in the dispatch or cafeteria areas. Frable was clearly agitated that morning, and her recollection of the events was very disjointed. Her testimony that LaRose pressed her for the name of the writer of the newspaper article made little sense. It would not have, of course, been written by an employee, and, moreover, the source appeared clear from the text. In contrast to Frable, LaRose was a very impressive witness who candidly admitted being perturbed by the publicity that the Union had generated in the newspapers. His denials as to questioning her about who wrote the pieces, and as to making any threats of discharge, had the ring of truth. I do not credit Frable, therefore, regarding any of the observations she made regarding the events in the cafeteria and dispatch area. All related objections would therefore fall, including the allegations that Frable was interrogated about the newspaper articles, that LaRose threatened the source of those articles with discharge,[27] and Petitioner's claim that LaRose "stood mute" while other employees reviewed the "vote no" cards and designated which of the employees who returned the cards would be discharged.[28]

As for the threat directed at Trueman, even the Employer does not attempt to dispute the accuracy of his account. Rather, it takes the position that McClain lacked the authority to fire Trueman, ergo, no threat was made. Based on Trueman's testimony, and that is the only evidence of record in this regard, it does appear that McClain by himself lacked the authority to terminate him. However, Trueman's testimony left the distinct impression that McClain, a stipulated supervisor, was able to effectively recommend such action to Chuck Jewel, another management official, and the Employer did not attempt to rebut this impression. Whether McClain could discharge solely on his own initiative or whether he could only effectively recommend such action is of little moment as he was still a supervisor threatening the workplace's version of capital punishment in retaliation for Trueman's crude, but protected, expression of union sympathy. It was also a threat made in the presence of several other employees with at least some dissemination. As a threat of discharge is highly coercive and one of the most serious forms of employer misconducts,[29] I would recommend that while all other portions of this objection be overruled, Objection 6, to the extent it relies on the threat made to Trueman, be sustained.

[23] She did not hear LaRose make any of the comments regarding the future of the employees who had left their "vote no" cards behind.

[24] Tr. 72.

[25] Tr. 79.

[26] See *Jefferson Stores, Inc*., 201 NLRB 672 (1973), a case that also involved the distribution of "vote no" cards which the Board found to be noncoercive and not a basis for setting aside an election.

[27] I do not have to reach under these circumstances the question as whether the conversation between Frable and LaRose concerning the newspaper article, conduct not specifically alleged as objectionable, was reasonable encompassed within the scope of the objections set for hearing.

[28] Even if I had been more inclined to credit her testimony, Frable failed to conclusively establish whether LaRose or any supervisor heard employees make these observations.

[29] *NLRB v. Jamaica Towing,* 632 F.2d 208 (2d Cir. 1980).